

Employer liability ito section 60 of the Employment Equity Act

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60 Liability of employers

(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

(3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.



Sex Discrimination Act 1975 (UK)

41 Liability of employers and principals

- (1) Anything done by a person in the course of his employment shall be treated for the purposes of this Act as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.
- (2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Act as done by that other person as well as by him.
- (3) In proceedings brought under this Act against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.



6 Prohibition of unfair discrimination

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to-

- (a) take affirmative action measures consistent with the purpose of this Act;
or
- (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).



4 Application of this Act

(1) Chapter II of this Act applies to all employees and employers.



When does 60 apply?

1. The conduct must be by an employee of the employer
2. The conduct must constitute unfair discrimination (ie it must constitute sexual harassment)
3. The conduct must take place while at work
4. The alleged conduct must immediately be brought to the attention of the employer
5. The employer must be aware of the conduct
6. There must be a failure by the employer to consult all relevant parties, or to take the necessary steps to eliminate the conduct or otherwise to comply with the EEA **AND (?)**,
7. The employer must show that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA

Mokoena v Garden Art (Pty) Ltd [2008] 5 BLLR 428 (LC)

[Also see *Potgieter v National Commissioner of SAPS* [2008]

JOL 22672 (LC)]



Defences available to employer against liability to section 60 of the EEA.

1. The harasser was not an employee.
2. The victim was not an employee.
3. The conduct complained of did not constitute harassment.
4. The harassment did not occur while at work.
5. The victim did not immediately (in the broad sense) bring it to the attention of the employer.
6. The employer consulted with all relevant parties and took steps to eliminate the harassment and took steps to ensure compliance with the EEA.
7. The employer did all that was reasonably possible to ensure that its employees would not harass.

Relationship between 6 and 7?

